

“The Expanding First Amendment” in an Age of Free Speech Paradox

PETER M. SHANE*

Ours is an age of intensifying free speech paradox. It has never been easier for individuals to find platforms from which to communicate pretty much anything at all to an audience of potentially global reach.¹ Yet daily news reports and punditry register the complaints of Americans who believe their opportunities for free expression are being squelched.²

The paradox is replicated in the domain of law. As several authors in this Symposium Issue explain, the Supreme Court in recent years has broadened the domain of communicative activity covered by the First Amendment’s “speech” protection and has limited in other ways the capacity of government to regulate communication based on content³—hence, the Symposium title, “The Expanding First Amendment.” But in terms of felt experience, many Americans perceive that their capacity to speak freely is increasingly being imperiled in ways for which they have no legal recourse.⁴

* Jacob E. Davis and Jacob E. Davis II Chair in Law, Moritz College of Law, The Ohio State University.

¹ On the potential of new communications technologies for democratic participation, see Peter M. Shane, *Online Consultation and Political Communication in the Era of Obama: An Introduction*, in *CONNECTING DEMOCRACY: ONLINE CONSULTATION AND THE FLOW OF POLITICAL COMMUNICATION 2* (Stephen Coleman & Peter M. Shane eds., 2012) (“Digital networks around the world are daily fostering innovative social practices and powerful new technologies of human connection that could sustain a democratic renaissance. Used in tandem with the many enduring legacy tools of personal and mass communication, the information and communication technologies (ICTs) of the digital age can promote knowledge and the exchange of ideas to a degree never before imagined.”).

² Possible examples are so numerous it is difficult to isolate just several as representative. Examples within the few months prior to the writing of this Foreword include Joy Overbeck, *Young America’s Foundation Sues Berkeley for Squelching Free Speech*, TOWNHALL (May 7, 2017), <https://townhall.com/columnists/joyoverbeck/2017/05/07/young-americas-foundation-sues-berkeley-for-squelching-free-speech-n2323402> [<https://perma.cc/ZK35-3HGK>]; Steve Schmadeke, *Improv Student Sues Suburban College, Alleges ‘Pimp’ Skit Led to Punishment*, CHI. TRIB. (Aug. 16, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-improv-pimp-lawsuit-20170816-story.html> [<https://perma.cc/Q2Q7-NZCL>]; Morgan Watkins & Phillip M. Bailey, *Kentuckians Sue Gov. Matt Bevin for Blocking Them on Twitter and Facebook*, COURIER-JOURNAL (July 31, 2017), <http://www.courier-journal.com/story/news/2017/07/31/kentuckians-sue-gov-matt-bevin-blocking-them-twitter-and-facebook/519427001/> [<https://perma.cc/D2UN-PGDD>].

³ See, e.g., Tabatha Abu El-Haj, “Live Free or Die”—Liberty and the First Amendment, 78 OHIO ST. L.J. 917 (2017); Ashutosh Bhagwat, *When Speech Is Not “Speech,”* 78 OHIO ST. L.J. 839 (2017); Caroline Mala Corbin, *A Free Speech Tale of Two County Clerk Refusals*, 78 OHIO ST. L.J. 819 (2017).

⁴ Brenda Major et al., *The Threat of Increasing Diversity: Why Many White Americans Support Trump in the 2016 Presidential Election*, SAGE JOURNALS 1–7 (2016), <http://journals.sagepub.com/doi/pdf/10.1177/1368430216677304> [<https://perma.cc/4NRK->

The sources of this paradox are manifold, but none is more consequential than the revolution in digital communications. The First Amendment, of course, applies only to government regulation of speech, not to the capacity of private entities to control (or fail to control) speech that occurs within private domains.⁵ Social media comprise the venues for most of our communications explosion, but the electronic public square is overwhelmingly in private hands. These powerful private entities, unlike the government, are legally entitled to censor speech on their platforms, and do so.⁶

The flip side of that phenomenon is that private web hosts have no legal obligation to deny a forum for communications that others may find offensive or intimidating. Thus, at the same time that digital technologies (along with print, broadcast, and cable) provide unprecedented opportunities for people to share provocative views, many people may find that they enter public debate only at risk of unleashing a torrent of personal attack that may be a source of embarrassment or worse. It is common for journalists and academics, as well as athletes and performing artists who publicly articulate controversial positions, to face threats to life and livelihood, as well as other forms of ridicule and abuse.⁷ The effect of massive volumes of vituperative, but constitutionally-

AUUK] (“Consistent with our theorizing, among Whites high in ethnic identification, the racial shift message indirectly predicted increased support for Trump and anti-immigrant policies, increased opposition to political correctness norms, and decreased support for Sanders via increased group status threat.”); Karen Tumulty & Jenna Johnson, *Why Trump May Be Winning the War on ‘Political Correctness,’* WASH. POST (Jan. 4, 2016), https://www.washingtonpost.com/politics/why-trump-may-be-winning-the-war-on-political-correctness/2016/01/04/098cf832-afda-11e5-b711-1998289ffcea_story.html?utm_term=.2ef769b1e0d1 [<https://perma.cc/LGH2-FWD2>]; Moira Weigel, *Political Correctness: How the Right Invented a Phantom Enemy*, GUARDIAN (Nov. 30, 2016), <https://www.theguardian.com/us-news/2016/nov/30/political-correctness-how-the-right-invented-phantom-enemy-donald-trump> [<https://perma.cc/2EKU-ADCJ>] (“Trump’s incessant repetition of the phrase has led many writers since the election to argue that the secret to his victory was a backlash against excessive ‘political correctness.’”).

⁵ U.S. CONST. amend. I (“Congress shall make no law . . .”) (emphasis added).

⁶ For example, the neo-Nazi website *The Daily Stormer* had no legal recourse against web hosting companies that decided, in the wake of a violent white nationalist rally in Charlottesville, Virginia, to deny the site either web name services or protection against digital attack. Katie Mettler & Avi Selk, *GoDaddy—then Google—Ban Neo-Nazi Site Daily Stormer for Disparaging Charlottesville Victim*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/08/14/godaddy-bans-neo-nazi-site-daily-stormer-for-disparaging-woman-killed-at-charlottesville-rally/?utm_term=.776d0b4acfe9 [<https://perma.cc/V68D-43GW>].

⁷ Luchina Fisher, *Emma Watson Says She Was Threatened After Speaking Out About Gender Equality*, ABC NEWS (Mar. 9, 2015), <http://abcnews.go.com/Entertainment/emma-watson-threatened-speaking-gender-equality/story?id=29500721> [<https://perma.cc/8CJV-CTHT>]; Colleen Flaherty, *Old Criticisms, New Threats*, INSIDE HIGHER ED (June 26, 2017), <https://www.insidehighered.com/news/2017/06/26/professors-are-often-political-lightning-rods-now-are-facing-new-threats-over-their> [<https://perma.cc/CW87-4T93>] (recounting threats to outspoken university professors); Emma Green, *The Tide of Hate Directed Against Jewish Journalists*, ATLANTIC (Oct. 19, 2016), <https://www.theatlantic.com/politics/archive/>

protected speech, in discouraging public debate is not literally censorship, but arguably as chilling as any government regulation.

It is also not quite accurate that First Amendment doctrine is expanding uniformly.⁸ For example, when government acts as an employer, many of the protections that usually exist against government regulation simply do not apply. In *Garcetti v. Ceballos*, the Roberts Court held: “[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁹ This is true even in a case, like *Garcetti*, where the speech involves a significant and nonpublic allegation of corruption.¹⁰ It is plainly consequential for the Trump Administration, which has triggered widespread reports of a clampdown on public communications by federal employees.¹¹

Amid this clash of competing forces, predicting either the likely or preferred course of First Amendment development is hardly an easy task. At one level, as Professor Ashutosh Bhagwat argues, it is not sustainable for the Court to treat as protected speech every form of human activity that has an expressive component.¹² When the Court changed its mind in the 1970s about the availability of First Amendment protection for commercial speech,¹³ it had a profound effect on the capacity of elected officials to regulate commercial

2016/10/what-its-like-to-be-a-jewish-journalist-in-the-age-of-trump/504635/
[https://perma.cc/Q5S3-E49B] (anti-Semitic death threats against Jewish reporters increased significantly during 2016 election cycle); Eoghan Macguire, *Colin Kaepernick: Quarterback Says He Has Received Death Threats*, CNN (Sept. 22, 2016),
http://www.cnn.com/2016/09/21/sport/colin-kaepernick-death-threats/index.html
[https://perma.cc/6LX2-6Y84].

⁸ See Ronald J. Krotoszynski, Jr., *Our Shrinking First Amendment: On the Growing Problem of Reduced Access to Public Property for Speech Activity and Some Suggestions for a Better Way Forward*, 78 OHIO ST. L.J. 779 (2017).

⁹ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). For an analysis of First Amendment concerns implicated in expressive government employee conduct, see generally Corbin, *supra* note 3.

¹⁰ *Garcetti*, 547 U.S. at 413–15.

¹¹ See, e.g., Coral Davenport, *Federal Agencies Told To Halt External Communications*, N.Y. TIMES (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/us/politics/some-agencies-told-to-halt-communications-as-trump-administration-moves-in.html?mcubz=3&_r=0 [https://perma.cc/A245-XZLF]; Andrew Restuccia et al., *Information Lockdown Hits Trump's Federal Agencies*, POLITICO (Jan. 24, 2017), http://www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122 [https://perma.cc/QMC8-VG56].

¹² Bhagwat, *supra* note 3, at 884–85.

¹³ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (holding commercial speech to be within First Amendment protection). On the importance of extending First Amendment protection to the speech of health care professionals that aims to protect patient health, see Wendy E. Parmet & Jason Smith, *Free Speech and Public Health: Unraveling the Commercial-Professional Speech Paradox*, 78 OHIO ST. L.J. 887 (2017).

activity. Extending constitutional protection to election finance¹⁴ or treating cable system owners as “editors” of the speech they transmit¹⁵ are decisions with profound consequences for the legitimate range of collective self-governance. If, as Professor Tabatha Abu El-Haj argues, the First Amendment was intended to support freedom *for*, not just freedom *from*, democratic self-governance,¹⁶ the boundless extension of First Amendment protection to everything people do that partakes of communication would be counterproductive; as citizens, we would find ourselves severely hobbled in efforts to advance the public good through democratic lawmaking.

This dilemma may well come to a head where First Amendment claims intersect with arguments based on the Second Amendment. Courts have held that the Second Amendment does not require government across-the-board to permit the open carriage of firearms,¹⁷ even though “open carry” may well have an expressive component. For many in the “audience” of open carry, however, the message received is one of intimidation, thus potentially chilling their expression and raising the question whether the expressive content of open carry weakens or actually strengthens the case for government regulation. It is noteworthy, for example, that the American Civil Liberties Union—long a stalwart institutional defender of free speech rights even for widely despised groups and individuals—now eschews the defense of groups seeking to stage protest demonstrations with firearms.¹⁸

Even if the Supreme Court declines to extend free speech protection to the expressive activity of open carry, however, the Court is unlikely to revert to speech protection only for actual speech in other contexts. The appeal of democracy lies not only in opportunities for collective decision-making, but also in the experience of individual men and women exercising autonomy in their own lives, including the control of their information-related or otherwise expressive activities.¹⁹ Broad readings of the First Amendment can enhance that experience of autonomy. Thus, Professor Jane Bambauer argues for the

¹⁴ *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (statutory bar to corporate independent political expenditures violates First Amendment); *Buckley v. Valeo*, 424 U.S. 1, 58 (1976) (independent expenditures and financial contributions on behalf of electoral candidates protected by the First Amendment).

¹⁵ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661–62 (1994) (subjecting “must carry” regulation of cable systems to intermediate scrutiny under the First Amendment).

¹⁶ Abu El-Haj, *supra* note 3, at 920–23, 944–45.

¹⁷ *See, e.g., Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013), *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134 (2014) (upholding legal requirement that applicants for open carriage of handguns demonstrate a “justifiable need” to publicly carry a handgun for self-defense).

¹⁸ Angelo Young, *After Backing White Nationalists in Charlottesville, ACLU Announces It Won’t Defend Armed Protesters*, SALON (Aug. 18, 2017), <http://www.salon.com/2017/08/18/after-backing-white-nationalists-in-charlottesville-aclu-announces-it-wont-defend-armed-protesters/> [<https://perma.cc/6KEU-2SC6>].

¹⁹ *See generally* C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251 (2011).

importance of expanding First Amendment protection for activities of experimentation and information-gathering,²⁰ and Professor Timothy Zick urges us not to be reflexively dismissive of novel First Amendment claims on behalf, for example, of transgender access to public facilities.²¹ In terms of the “lived experience” of free expression, these positions are hardly without appeal.

And if this complexity were not dizzying enough, finding the proper normative stance on First Amendment doctrine is complicated further by the realities of social, economic, and political power. The risks and rewards of expanding or restricting free speech rights are typically not distributed at random across the population. The right to spend unlimited personal funds on election campaigns is not of equal benefit to both rich and poor. Should online commercial platforms receive First Amendment protection against the imposition of antidiscrimination laws, the burdens of any resulting discrimination in the provision of services will inevitably fall more heavily on racial minorities and LGBT individuals.²² If drug companies are allowed to market pharmaceuticals for unproven off-label uses, those with fewer resources to conduct their own product research or to withstand the economic loss of funds wasted on misguided purchases will suffer more.²³

Yet, any doctrinal project of trying to advance social equality by curtailing free speech rights would surely be fraught. The most compelling argument against permitting government rules against hate speech is “the worry that those who create and enforce content-based speech restrictions will do so incompetently or abusively.”²⁴ This danger would exist even among government officials who are sincerely committed to impartiality as a norm of democratic governance. But witnessing the head of the federal executive branch abusing news outlets and individual journalists by name,²⁵ calling for criminal

²⁰ Jane R. Bambauer, *The Empirical First Amendment*, 78 OHIO ST. L.J. 947, 947–48, 962 (2017).

²¹ Timothy Zick, *Restroom Use, Civil Rights, and Free Speech “Opportunism,”* 78 OHIO ST. L.J. 963, 963–67, 998–99 (2017).

²² Nancy Leong, *The First Amendment and Fair Housing in the Platform Economy*, 78 OHIO ST. L.J. 1001, 1001–03, 1016–17 (2017).

²³ On the debate concerning off-label drug regulation, see generally Christopher Robertson, *The Tip of the Iceberg: A First Amendment Right To Promote Drugs Off-Label*, 78 OHIO ST. L.J. 1019 (2017), and Patricia J. Zettler, *The Indirect Consequences of Expanded Off-Label Promotion*, 78 OHIO ST. L.J. 1053 (2017).

²⁴ Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 2038 (2017).

²⁵ *President Trump Ranted for 77 Minutes in Phoenix. Here’s What He Said*, TIME (Aug. 23, 2017), <http://time.com/4912055/donald-trump-phoenix-arizona-transcript/> [<https://perma.cc/J9VM-R68Z>] (“If you’re reading a story about somebody, you don’t know. You assume it’s honest, because it’s like the failing New York Times, which is like so bad. It’s so bad. Or the Washington Post, which call a lobbying tool for Amazon, OK, that’s a lobbying tool for Amazon. Or CNN, which is so bad and so pathetic, and their ratings are going down. . . . I must tell you, Fox has treated me fairly. Fox treated me fairly.”).

and congressional investigations of political opponents,²⁶ and ridiculing the heads of businesses that are critical of his performance,²⁷ it is perhaps easier to foresee the risks in empowering officials to shut down speakers they find “hateful.”

Americans will always find their lived experience of “free speech” conditioned not only by the First Amendment’s restrictions on government censorship, but also by social norms, the exercise of private authority, the ways in which speaking rights interact with other rights, and the opportunities and risks associated with expanding information technologies. Aware of this complex landscape, the essays in this Issue represent thoughtful contributions to an ongoing and always urgent national conversation on the relationship between First Amendment doctrine, individual liberty, and democratic self-governance.

²⁶ Steve Benen, *Trump Still Wants a Federal Investigation into Hillary Clinton*, MSNBC (July 24, 2017), <http://www.msnbc.com/rachel-maddow-show/trump-still-wants-federal-investigation-hillary-clinton> [<https://perma.cc/HH5D-WVYJ>] (“So why aren’t the Committees and investigators, and of course our beleaguered A.G., looking into Crooked Hillarys [sic] crimes & Russia relations?” (quoting Donald J. Trump (@realDonaldTrump), TWITTER (July 24, 2017, 5:49 AM), <https://twitter.com/realdonaldtrump/status/889467610332528641?lang=en> [<https://perma.cc/DPL9-LZAG>]))).

²⁷ Rob Torno, *Three CEOs Quit Trump’s Manufacturing Council, but He Only Lashes Out at One*, INQUIRER (Aug. 14, 2017), <http://www.philly.com/philly/news/politics/presidential/trump-response-charlottesville-merck-ceo-kenneth-frazier-20170814.html> [<https://perma.cc/WVZ5-NS6C>] (“Now that Ken Frazier of Merck Pharma has resigned from President’s Manufacturing Council, he will have more time to LOWER RIPOFF DRUG PRICES!” (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 14, 2017, 5:54 AM), <https://twitter.com/realdonaldtrump/status/897079051277537280> [<https://perma.cc/8E6U-F6EH>]))).